BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 02-136
Table of Allotments,	)	
FM Broadcast Stations	)	
(Arlington, The Dalles, Moro, Fossil, Astoria,	)	
Gladstone, Tillamook, Springfield-Eugene,	)	
Coos Bay, Manzanita and Hermiston, Oregon	)	
and Covington, Trout Lake, Shoreline, Bellingham,	)	
Forks, Hoquiam, Aberdeen, Walla Walla, Kent,	)	
College Place, Long Beach and Ilwaco, Washington)	)	

To: The Commission

REPLY TO OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT

Triple Bogey, LLC; MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey") herein reply to the "Opposition to Motion for Leave to Supplement," filed December 15, 2004, by Mid-Columbia Broadcasting, Inc. and First Broadcasting Investment Partners, LLC (collectively, "Joint Petitioners"). In reply, the following is stated:

Procedural Arguments. The Joint Petitioners' primary procedural objection to Triple Bogey's "Motion for Leave to Supplement Reply to Oppositions of Joint Petitioners and Supplement," filed December 1, 2004 (hereinafter "*Motion*"), is that it was filed after the deadline for an application for review in this proceeding. But, of course, that is exactly why Triple Bogey moved for leave to

file its supplement. If its supplement could have been filed as a matter of right, no accompanying motion would have been necessary.

The time limitations on the filing of applications for review, as well as oppositions and replies thereto, are established solely by Commission rule. *See Crystal Broadcast Partners*, 11 FCC Rcd 4680, 4680-81 (1996). The Commission, therefore, may waive a filing deadline if a party shows good cause. *E.g.*, *Gilmore Broadcasting Corporation*, 5 FCC Rcd 5530, n.1 (1990) (Section 1.115(d) waived to accept supplements because those pleadings related to developments subsequent to the original application for review).

Triple Bogey submitted its Motion to bring to the Commission's attention a staff ruling released some three months *after* Triple Bogey filed its Application for Review. That case, *Sells, Arizona*, DA 04-3514 (Assistant Chief, Audio Div., released November 22, 2004), deals directly with a key issue in this proceeding that Triple Bogey repeatedly raised below[1] but the *Report and Order* improperly failed to even address: whether it is contrary to both the public interest and established Commission policy to use vacant "back-fill" allotments to cover white and gray areas that modification of an existing station's allotment would create. Thus, good cause clearly exists to take cognizance of the *Sells* decision here.

The Joint Petitioners cite *Great Western Cellular Partners, LLC*, 17 FCC Rcd 8508, ¶ 1 n.1 (2002), in which the Commission refused to consider a late-filed "amendment" to an application for review. In that case, however, the party did not seek leave to file its amendment, which was more

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[1] *See* Triple Bogey's Reply Comments, filed March 25, 2003, pp. 10-15 and Triple Bogey's Reply to Supplement, filed May 21, 2004, pp. 6-10. Of course, the issue also was addressed in Triple Bogey's Application for Review, filed August 20, 2004, pp. 14-19.

than a year delinquent. Here, not only has Triple Bogey requested leave to submit its supplement, but it presented that supplement only a week after *Sells* was released.

The Joint Petitioners further argue the supplement should be rejected because the combined length of Triple Bogey's Application for Review and the proffered supplement exceeds the 25-page limit set forth in Section 1.115(f) of the Commission's Rules. But the Joint Petitioners point to no case in which the Commission, having waived the Section 1.115(d) filing deadline in order to consider a supplement, then rejected the supplement because of the Section 1.115(f) page limit.

The simple procedural question presented is whether there is good cause to take note of a recent staff decision that deals directly with legal principles at issue in this proceeding. Such good cause is clearly present.[2]

Substantive Arguments. The Joint Petitioners argue that the supposedly "novel" policy upon which *Sells* is based should not be "retroactively" applied in this case. The argument is without merit.

Most importantly, the policy underlying the *Sells* decision is not novel. To the contrary, it is based upon *Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990) ("*Community of License II*"), wherein the Commission expressly ruled that replacement of an operating station with a vacant allotment or unconstructed permit, although a factor to be considered, "does not adequately cure the disruption to 'existing service' occasioned by removal of an operating station." *Id.* at ¶ 19. *Community of License II*, in turn, was based on the

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[2] Moreover, the Joint Petitioners cannot be heard to complain they have been denied the opportunity to address the *Sells* case. They used more than five pages of their nine-page opposition to argue why the principles upon which *Sells* rests should not be applied here.

bedrock principles that the public has a legitimate expectation that existing service will continue and that the curtailment of existing service is not in the public interest. *E.g., Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); *KTVO, Inc.*, 57 RR 2d 648 (1984).

Clearly these long-standing principles, given fresh voice in *Sells*, should not be ignored in this proceeding – particularly given that Triple Bogey raised them in a timely manner. Indeed, in its pleadings, Triple Bogey quotes the same language from *Community of License II* that the staff quotes in *Sells*.[3]

In an effort to characterize *Sells* as a radical change in Commission policy, the Joint Petitioners assert the Commission expressly has condoned the use of vacant allotments to fill in white and gray areas. The Joint Petitioners cite two cases, *Eatonton, Georgia*, 6 FCC Rcd 6580 (Chief, Media Bureau 1991), and *Caliente, Nevada*, DA 04-2146 (Assistant Chief, Audio Div., released September 3, 2004). First, as the citations above indicate, each is staff ruling, not a full Commission decision. Second, in neither case was the use of a back-fill vacant allotment to cover a white or gray area material to the decision. In *Caliente*, the proponent proposed two vacant allotments to prevent creation of a gray area containing 11 persons. But the Commission's staff found that, in fact, there was no populated gray area. *Id.* at ¶ 13. In *Eatonton*, the relocation plan of the party that proposed vacant back-fill allotments to cover white and gray areas was denied. Ironically, in denying that proposal, the Commission staff, citing *Community of License II*, *supra*, and *Hall v. FCC*, *supra*, found that the disruption of service to the population the station currently served offset any benefits to be derived from adoption of the proposal. *Eatonton* at ¶¶ 34-35.

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[3] *Compare Sells* at ¶¶ 8–9 *with* Triple Bogey's Reply Comments, filed March 25, 2003, at p.15 (both quoting *Community of License II*, 5 FCC Rcd at 7097 (¶ 19)).

Moreover, the white area in issue was very small – four square kilometers with a population of 28 persons. *Id.* at ¶ 32.

To avoid application in this case of the policy upon which *Sells* rests, the Joint Petitioners, citing *Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291 (2003) ("*Refugio I*"), *recon. denied*, 19 FCC Rcd 10950 (2004) ("*Refugio II*"), argue that the "no back-fill" policy is to be applied in pending cases only and not retroactively.[4] The Joint Petitioners thus assert that *Sells*, because it relied on the *Refugio* policy, should not be applied "retroactively" in this proceeding.

The argument fails. First, as noted above, the *Sells* decision is rooted in long-standing Commission policy, which the *Report and Order* wrongly ignored. To continue to ignore this policy in this proceeding would be contrary to the public interest. *See Refugio II*, 19 FCC Rcd at 10957 & n.52. Second, even using the Joint Petitioners' crabbed definition of "pending," this case clearly was still pending at the time *Refugio II* was released. (Specifically, *Refugio II* was released June 16, 2004, whereas the *Report and Order* in this proceeding was released July 9, 2004.) Thus, the fundamental ruling underpinning *Refugio I* and *Refugio II* (*i.e.*, that the use of a vacant back-fill allotment to replace existing service is unacceptable, given that the ultimate licensing of the replacement station through the FCC's auction procedures is both an uncertain and time-consuming process) should be applied here.

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[4] Under the Joint Petitioners' interpretation of *Refugio II*, a case is pending only if a report and order has not yet been issued. It is their view that if a report and order has been issued, even if that ruling is subject to a petition for reconsideration and/or an application for review, the case is no longer pending. The Joint Petitioners' interpretation is based upon a bare citation in *Refugio II* to *Barnwell, South Carolina*, 18 FCC Rcd 15152 (Assistant Chief, Audio Div. 2003). Notwithstanding the Joint Petitioners' assertion to the contrary, an allotment proceeding obviously remains *pending* if it is subject to staff or Commission review.

The Joint Petitioners ask for "full Commission review" before the widespread application of the *Sells* decision. But of course Triple Bogey, through its Application for Review, already has requested full Commission review of the staff's failure to apply in this proceeding a long-standing Commission allotment policy – a policy confirmed some fourteen years ago in *Community of License II*, which properly was applied in *Sells*. To the extent that the Commission's staff may have strayed in other cases from the principles enunciated in *Community of License II*, the Commission must correct that practice now.

In their Opposition, the Joint Petitioners seem to fear application of the policy underlying *Sells* would call into question the methodology used in determining gain and loss areas in allotment proceedings generally. While it may be worthwhile for the Commission to revisit that methodology, it is unnecessary to do so in this case. The real world problem presented here is that adoption of the Joint Petitioners' proposal would mean the loss of the only radio service available to some 1,800 residents of north-central Oregon and south-central Washington. That service would be restored, if ever, only years from now – given the fact the Commission already has a backlog of roughly 300 vacant FM allotments that have not yet even been scheduled for auction.

WHEREFORE, In light of all circumstances present, Triple Bogey's Motion for Leave to Supplement Reply to Opposition of Joint Petitioners should be GRANTED and its proffered Supplement should be CONSIDERED in this proceeding.

TRIPLE BOGEY, LLC, MCC RADIO, LLC, AND KDUX ACQUISITION, LLC

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December 28, 2004

CERTIFICATE OF SERVICE

I, Matthew H. McCormick, do hereby certify that I have on this 28th day of December, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing REPLY TO OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT to the following:

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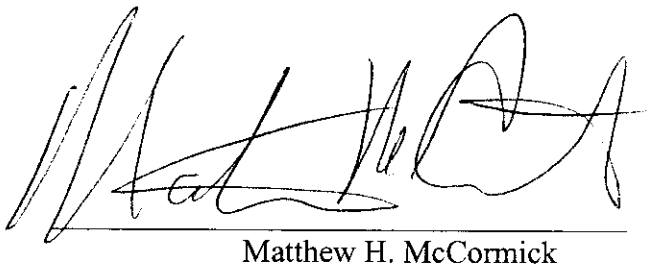

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* Hand Delivered